

1 has no weight.

2 Q Why?

3 A The same answer from yesterday.

4 We had a contract in the NFL case, right, in
5 which there was a tiering right and Comcast
6 exercised its tiering right in the NFL's
7 opinion in a discriminatory fashion, violation
8 of the Cable Act.

9 I don't remember the contract
10 being the existence of a contract as being a
11 critical issue there. I think there's a
12 direct analogy here which is that there's a
13 contract. Comcast was able to work in an
14 option that gave it some discretion to not
15 carry MASN. They're exercising that option
16 and I think MASN believes they're doing so in
17 a way that violates the Cable Act.

18 The only thing I can add that
19 maybe I said or didn't say yesterday is that
20 I think I did. I went through the eight
21 factors of the News Corp. MO&O, and one of
22 the very bottom factors, either seven or eight

1 says look at the contract. This presumes that
2 you failed. This is what I call phase two or
3 the valuation part of the analysis which is if
4 you don't have voluntary, this was a factor
5 one, if you don't have voluntary transactions
6 for the content at issue in the same
7 geographic markets, move to number two.

8 Way down the list was you can look
9 at the price that was contracted for between
10 the two parties. But of course, there's a
11 reason why I chose at the bottom of the list,
12 right? If someone, if a victim of
13 discrimination succumbed to some terms, just
14 because it was better than not doing a deal,
15 we wouldn't want those terms to inform the way
16 in which the victim of discrimination had to
17 abide for the rest of its existence.

18 Q I still don't understand why the
19 contract was not an element in your economic
20 analysis? A moment ago, you said that you
21 have to look at this whole case in context.
22 You have to go back three years. You have to

1 look at the positions of the parties relative
2 to how things existed before.

3 Isn't the contract a major element
4 in determining whether there's discrimination
5 here?

6 A If the contract is there, we can't
7 ignore it. The decision maker is going to
8 decide how much weight that contract gets.

9 Q But I'm asking you in your
10 economic analysis.

11 A Sure.

12 Q Where we're relying on your
13 professional opinion.

14 A Sure.

15 Q And my question to you is why --
16 you've indicated to me that the contract was
17 not an element in your analysis. And my
18 question is why, why not?

19 A Right. I think I would have to
20 give some sort of economic opinion or
21 interpretation of why the contract was entered
22 into, what do the terms mean? I've steered

1 clear of that. If you want to ask me what my
2 opinion is of the contract, why it was entered
3 into, what do I think the terms mean, I could
4 tell you my economic opinion, but I didn't --
5 I frankly just think that if -- what I'm
6 trying to do and I'm trying to telegraph this
7 in the introduction of my report is can I lend
8 any economic analysis to these inquiries that
9 we're supposed to undertake per the Cable Act.
10 Did discrimination occur here? And you start
11 off are the networks similarly situated? Is
12 there evidence of disparate treatment? And
13 then you move to the impairment. I'd be hard
14 pressed to try to fit into that analysis where
15 the existence of a contract would go.

16 Q We'll move on to a different area.
17 MASN is owned by the O's and by the Nats,
18 correct?

19 A Correct.

20 Q In your professional opinion, does
21 that provide MASN with an incentive to carry
22 those ball games and enter into contracts with

1 those ball teams on the MASN network as
2 opposed to carriage on Comcast's system? Is
3 that something you've looked at?

4 A I am a little confused by the
5 question.

6 Q Let me rephrase. I don't want you
7 to be confused.

8 If MASN to the extent that it has
9 an ownership in the -- strike that.

10 To the extent MASN is owned by
11 teams for which it carries the programming,
12 does that make MASN a vertically-integrated
13 entity?

14 A Sure, in a sense.

15 Q Okay. Does MASN have any
16 financial incentive to put those games on its
17 network as opposed to allowing O's games and
18 Nats games on Comcast's system?

19 A When you say "system" I think
20 that's what threw me. I think we mean to say
21 on Comcast's sports, competent sports network.

22 Q Correct.

1 A Got it. Right and we can go into
2 the Comcast systems, or all these lawyers
3 wouldn't be sitting around the table.

4 Do they want the Orioles' telecast
5 rights to go to Comcast SportsNet? No,
6 they've made the decision that they want to
7 vertically integrate into the programming,
8 into the network space. And they feel that
9 they can do better in that capacity than if
10 they just sold the rights to Comcast
11 SportsNet.

12 Q Is there anything wrong with that?

13 A No, and in fact, I don't think
14 there are any protections against such
15 behavior that can be found on the Cable Act,
16 if I'm correct.

17 JUDGE SIPPEL: Baseball has become
18 integrated then?

19 THE WITNESS: Right, and we can go
20 into why teams are doing that, but it's not
21 just the Orioles and Nationals. This is
22 pretty generic phenomenon about teams, instead

1 of just selling the television rights to some
2 third party, they're actually vertically
3 integrating and starting their own networks.

4 JUDGE SIPPEL: Does that give them
5 more market power in terms of which carriers
6 would take their product?

7 THE WITNESS: I don't know. I
8 don't think it gives them any more market
9 power. Because the market power is all
10 cashiered in just the fact that they own the
11 rights to begin with.

12 I think that it allows them to --
13 and I'm not an expert. I'm only getting this
14 through what I read in newspapers and trade
15 press, but what I understand is it allows them
16 to move revenues outside of the system that
17 would otherwise be subject to some kind of
18 revenue limitations that Major League Baseball
19 imposes on them.

20 JUDGE SIPPEL: Major League
21 Baseball is the owners of the teams.

22 THE WITNESS: Right, but there's

1 some kind of revenue sharing arrangement.

2 JUDGE SIPPEL: Oh, if you get too
3 good.

4 THE WITNESS: Too much revenue,
5 depending on the source of the revenue. And
6 I think if the revenue is earned from an
7 affiliated RSN, it doesn't count towards
8 revenues that are subject to -- and that's
9 about the extent of my knowledge. I should
10 shut up there.

11 JUDGE SIPPEL: I think Mr.
12 Steinbrenner was instrumental in that.

13 THE WITNESS: Yes, yes. But the
14 problem is because the Orioles compete against
15 Mr. Steinbrenner, now he's got a source of
16 revenue that they don't. It all goes downhill
17 from there. That's right.

18 BY MR. SCHONMAN:

19 Q Dr. Singer, would you turn to MASN
20 Exhibit 238 which is your direct written
21 testimony, please? Page three, paragraph six.

22 JUDGE SIPPEL: I'm sorry, where

1 are you?

2 MR. SCHONMAN: Dr. Singer's direct
3 written.

4 THE WITNESS: I've got it.

5 MR. SCHONMAN: Which is Exhibit
6 238 and I'm directing his attention to
7 paragraph 6.

8 JUDGE SIPPEL: Okay.

9 BY MR. SCHONMAN:

10 Q In the first sentence you say "by
11 almost any metric, MASN, CSNMA, and CSN Philly
12 are similarly situated in the contested
13 areas." Are there metrics which don't support
14 that?

15 I'm focusing on your phrase "by almost any."
16 I don't know if you meant "by almost every" or
17 "by almost any", but it looks like you're
18 excluding some networks.

19 A Well, how about this if you want a
20 counter-example. We talked about this ex post
21 and ex ante analysis. We could come up with
22 programming that's inside the MASN family now

1 that on ex post basis may look different than
2 some programming that's inside of Comcast.
3 But I'd be hard pressed to do that. But it's
4 conceivable, as a matter of logic.

5 Q The very last word on page three,
6 the word "for", F-O-R?

7 A Yes.

8 Q And then it continues onto the
9 next page. "For example, MASN failed to
10 secure the rights to broadcast the Washington
11 Redskins pre-season football games
12 specifically because of the coverage gaps at
13 issue in this case."

14 How do you know they failed to do
15 that specifically because of coverage gaps?

16 A This is the testimony, I'm relying
17 on the testimony of Mr. Cuddihy here and my
18 conversations with him.

19 Q Beyond those conversations, you
20 have no personal knowledge?

21 A No, I've never interviewed the
22 Redskins personally if that's what you're

1 asking, why didn't you go with MASN, why did
2 you go with CSN?

3 Q I'm just asking if you had any
4 personal knowledge beyond the conversations?

5 A No, the conversations and his
6 direct testimony.

7 Q Near the end of paragraph seven,
8 you say "Collectively, these in-region MVPD
9 rivals account for nearly 80 percent of all
10 non-Comcast new DVT subscribers in the
11 contested areas."

12 And that goes towards demand,
13 correct? This discussion of paragraph seven?

14 A Correct.

15 Q In your professional opinion,
16 should we distinguish between the number of
17 subscribers and ratings? That is, people
18 actually watch the programs on this 80 percent
19 number? Do you understand my question?

20 A I think so. I think they should
21 both be given some weight. I mean we're
22 trying to make a judgment ultimately of fan

1 interest, right, for programming in the
2 contested areas and a nice approximation of
3 fan interest is what the MVPDs are doing on
4 behalf of their customers, right?

5 Q That's one factor, correct? Other
6 MVPDs carry the programming so the -- so
7 Comcast ought to be? Is that essentially your
8 testimony?

9 A No, no, no, no.

10 Q Well, help me out here. What is
11 your testimony?

12 A That's just one element, right?
13 You've got to establish lots of things before
14 you get to the oughta be, right?

15 Q Well, let me ask it this way.
16 It's your position that 80 percent of non-
17 Comcast MVPDs carry MASN programming in the
18 contested areas?

19 A Right, just be careful. If you
20 weight those MVPDs by the number of
21 subscribers they have.

22 Q We'll do that. Extreme position,

1 what if none of the people, what if none of
2 those subscribers actually watched MASN
3 programming? We know that they have the
4 capability of viewing it because the MVPDs
5 carry it, but the extreme example would be no
6 one watches it. I guess we're talking
7 ratings, correct?

8 A Sure.

9 Q In your economic analysis, did you
10 consider ratings for MASN programming in those
11 disputed areas?

12 A I did.

13 Q And what did you come up with?

14 A I showed in a footnote later in
15 the report of how Orioles' programming when it
16 was carried on CSNMA fared in Harrisburg. I
17 think I also showed how it fared in some of
18 the other areas. And the number is
19 significant in -- at least to the or Orioles,
20 they think this [REDACTED] is a success. They
21 consider that to be a success.

22 Q Did you examine any ratings on

1 those systems that do carry it, the 80
2 percent?

3 A In 2008, when it was MASN, the
4 same or similar programming was carried by
5 CSNMA

6 Q Let me take a moment to read the
7 full paragraph and you do the same. Maybe I'm
8 not phrasing it --

9 A Which paragraph?

10 Q Paragraph seven of your direct
11 testimony.

12 JUDGE SIPPEL: Do you want to read
13 it out loud? That's all right, do it any way
14 you want to do it.

15 THE WITNESS: I've read it.

16 BY MR. SCHONMAN:

17 Q And so have I. If I understand
18 paragraph seven, what you're testifying to
19 here is that there are plenty of other MVPDs
20 that do carry the MASN programming in the
21 disputed areas and Comcast does not.

22 A Yes, at the same exact price that

1 MASN seeks here.

2 Q Okay, and in fact, you're also
3 saying that 80 percent of the MVPDs in the
4 contested areas carry it and Comcast does not
5 carry it?

6 A Correct, so long as you understand
7 how the 80 percent is being calculated.

8 Q Right, I understand it's weighted.

9 A Yes.

10 Q And my question for you as to the
11 MVPDs that do carry it now, the 80 percent,
12 did you look at the ratings for MASN on those
13 MVPDs?

14 A Well, I don't know if such data
15 exists of ratings on an MVPD basis, like how
16 many are DIRECTV subs are actually tuned in.
17 You could get Nielsen ratings for all MVPDs in
18 a given, say in the Roanoke DMA and see how
19 well MASN is doing in the Roanoke today.

20 Q So it's possible to get that
21 ratings data, is that correct?

22 A In theory, it should be possible.

1 Whether or not MASN ever turned over that data
2 to me, I can't be sure.

3 Q But in any event, you did not
4 consider the ratings on those MVPDs, that is
5 MASN's ratings on those -- that 80 percent?

6 A No. I'll restate it. My report
7 does not contain any ratings data of MASN in
8 the relevant DMAs, among those who are
9 currently carrying MASN.

10 Q Okay. From that process, we
11 extracted an answer.

12 A Sorry.

13 Q That's partially my fault.

14 JUDGE SIPPEL: Almost at the end?

15 MR. SCHONMAN: Yes, almost to the
16 end.

17 BY MR. SCHONMAN:

18 Q Can you turn to paragraph 29,
19 please?

20 A Sure.

21 Q Of your direct testimony. You
22 state there in the first sentence, "the

1 Commission has explicitly recognized that any
2 carriage decision based solely on affiliation
3 is likely to be anti-competitive, especially
4 when it involves a vertically-integrated cable
5 operator like Comcast." And then it goes
6 "excluding an unaffiliated RSM like MASN."

7 The word "especially" is throwing
8 me a little here because is it your testimony
9 that the Commission has recognized that any
10 carriage decision based solely on affiliation
11 is likely to be anti-competitive for
12 nonvertically-integrated entities?

13 A I think the emphasis in the second
14 part of the sentence was not on the vertically
15 integrated because you're right, if it was
16 based on affiliation, then it must have been
17 vertically integrated. So the emphasis that
18 I intended maybe not as artfully as I could
19 have been, is on the Comcast part.

20 Q So I shouldn't draw any
21 significance to that word "especially"?

22 A No, you should, but the second

1 clause is quite long, and you're putting the
2 emphasis on the vertically integrated and I
3 intended to put the emphasis on Comcast and
4 RSNs like MASN.

5 Q Let's turn to paragraph 32.

6 MR. SCHONMAN: We're almost there,
7 Your Honor.

8 JUDGE SIPPEL: All right.

9 BY MR. SCHONMAN:

10 Q In the second sentence of
11 paragraph 32 you say "you believe nearly every
12 other significant MVPD in the contested areas
13 including Comcast and region competitors,
14 DIRECTV and Dish Network, voluntarily chose to
15 carry MASN on their most penetrated tiers at
16 the same rates offered to Comcast."

17 A I'm sorry, what paragraph?

18 Q I'm sorry, paragraph 32.

19 A Okay.

20 JUDGE SIPPEL: What page?

21 MR. SCHONMAN: Second sentence.

22 THE WITNESS: I'm there.

1 BY MR. SCHONMAN:

2 Q You say "nearly every other
3 significant MVPD." And the question for you
4 is what significant MVPDs chose not to carry
5 MASN?

6 A Well, none of them are certainly,
7 in my opinion, as significant as Comcast
8 primary in region rivals, DIRECTV, Dish
9 Network and Verizon. There's a big step down
10 after that, but I can at least conceive of the
11 possibility that if you take the largest, next
12 largest carrier in the DMA, you might have
13 somebody of substance, at least in that DMA.

14 In Mr. Orszag's direct testimony,
15 he lists all the MVPDs that do not carry MASN
16 and I believe he puts in parentheses the
17 number of subscribers they have.

18 Q And you considered at least some
19 of them to be significant?

20 A I think the example that was
21 pointed out to me today of [REDACTED]
22 [REDACTED] is arguably important. It

1 certainly is not on the same scale as the big
2 guys, but it's something.

3 JUDGE SIPPEL: It's a needle
4 mover.

5 THE WITNESS: You know, if you
6 told MASN it was going to get [REDACTED] subs in
7 Harrisburg, would they go out and party like
8 rock stars tonight, I don't know. I don't
9 know if they would. They'd be excited,
10 certainly. [REDACTED].

11 MR. SCHONMAN: I didn't know that
12 needle moving was in your glossary.

13 JUDGE SIPPEL: I hope to see it.

14 BY MR. SCHONMAN:

15 Q Last question for you. I'd like
16 you to look at paragraphs 38 and 39 of your
17 direct written testimony. Got it there?

18 A Got it.

19 Q In paragraph 38, you state second
20 sentence, "for instance, by foreclosing rivals
21 from the most efficient distribution network
22 for delivery of the relevant product, a

1 monopolist can force rivals to incur higher
2 costs at all levels of outbreak."

3 And then in paragraph 39 you go on
4 to talk about Comcast's refusal to carry MASN.
5 And I'm juxtaposing paragraph 39 to 38. Are
6 you stating here that in your opinion you
7 consider Comcast to be a monopolist? Is that
8 the inference I should draw from this?

9 A While I may think that, I've not
10 tried to make a proof of their monopoly power
11 in this report.

12 Q Why do you think they're a
13 monopolist?

14 A I think I just got myself in
15 trouble, right? They have a demanding share.
16 I'm not -- I don't know if I could rattle off
17 their market share by memory, but it's well
18 over 60, could be over 70 and in Philadelphia,
19 of course, it's over 80, I think or was until
20 fairly recently.

21 That's where an economist starts.
22 He looks at market share, of course, and then

1 you look at things like if you have a high
2 market share, you look at barriers to entry,
3 but that, I didn't explore that proposition in
4 any kind of detail, at least here because I
5 don't see that as an element of the proof.

6 JUDGE SIPPEL: A dominant
7 competitor can act like a monopolist, can't
8 they?

9 THE WITNESS: Absolutely,
10 absolutely.

11 JUDGE SIPPEL: Even though it's
12 not a monopolist in the pure sense of the
13 definition.

14 THE WITNESS: That's possible.

15 BY MR. SCHONMAN:

16 Q But you reached no conclusions in
17 your analysis that Comcast is a monopolist?

18 A No, and I don't think it's
19 necessary. What's necessary is what I call
20 the foreclosure share, how much Comcast can
21 shut you down. It has to be big or
22 significant. And of course, if Comcast only

1 had 30,000 subs, the DMA, and was denying
2 access of those 30, it would be harder to
3 demonstrate impairment or significant
4 impairment.

5 Q This is really my last question.

6 A Okay.

7 Q And I'm just curious. Is there a
8 distinction between a monopoly and a
9 monopolist?

10 A Not really. The monopolist is
11 just the embodiment of -- it's how you refer
12 to the person who has monopoly power.

13 MR. SCHONMAN: That will do it,
14 Your Honor.

15 JUDGE SIPPEL: Thank you.
16 Redirect.

17 MR. KIM: Thank you, Your Honor.
18 I'll try to keep this fast, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. KIM:

21 Q Dr. Singer, do you recall being
22 asked certain questions by Comcast as to where

1 you say in your testimony that ad. revenues
2 for MASN are computed per eyeball?

3 A I think so.

4 Q Can I direct you to your testimony
5 which is admitted in evidence as MASN Exhibit
6 238 and ask you to look at page 22, footnote
7 39?

8 A Yes, I see it.

9 Q Could you read that for the Court,
10 please?

11 A The entire footnote?

12 Q Yes, sir. It's only three
13 sentences.

14 A Okay, I'll read it. "Conversation
15 with John McGuinness, VP for Integrated Sales
16 and Marketing MASN, April 29, 2009. Because
17 advertising fees are denominated in terms of
18 number of viewers reached, MASN realizes a
19 loss in advertising revenues from existing
20 advertising clients as a result of Comcast's
21 exclusionary conduct in the contested areas.
22 Moreover, MASN forgoes incremental advertising

1 revenues from clients who do not advertise on
2 MASN due to MASN's coverage caps."

3 Q Do you recall Comcast asking you
4 certain questions about whether you were aware
5 of a newspaper article showing that
6 advertising revenues for MASN jumped from 2007
7 to 2008?

8 A Yes, I remember that.

9 Q Do you recall whether MASN has
10 always carried the programming of the Orioles
11 and the Nationals?

12 A I don't think that they've always
13 carried both.

14 Q Do you recall whether they started
15 carrying games of the Nationals first and a
16 few years later picked up the rights to the
17 O's?

18 A Sounds correct.

19 Q As an economist which advertising
20 revenues would be higher and rates would be
21 higher if you had programming from one of the
22 major baseball teams or both of them?